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No. 08-828

IN THE

Supreme Court of the United States

JOHNNY D. THORNTON, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Rehabilitation Act of 1973 requires an employer to accommodate or attempt to accommodate an individual with a mental disability.

Whether a claim of reprisal under Title VII of the Civil Rights Act of 1964 is valid where a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.

The United States Court of Appeals for the Fourth Circuit adopted and affirmed the decision of Eastern District of Virginia, which granted the United States Drug Enforcement Agency's Second Motion for Summary Judgment. This appeal challenges the circuits court's finding that the DEA is under no obligation to provide or look for an accommodation for an individual with a mental disability, and that only an individual in a decision making position can commit claims of reprisals.

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OPINION BELOW

The opinion of the court of appeals (07-1988) is unreported. However, the opinion is included herewith in the Appendix. The opinion of the district court (1:06-cv-00397-GBL) is also included herewith in the Appendix, as it was adopted and affirmed by the court of appeals. The order of the court of appeals denying Petitioner's petition for rehearing and rehearing en banc is included herewith as part of the Appendix.

JURISDICTION

The Order of the court of appeals, denying a rehearing and a rehearing en banc, was entered on September 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

29 U.S.C. 794(a) and 42 U.S.C. §2000(e)-3(a). (See appendix)

STATEMENT

The Petitioner, Mr. Johnny D. Thornton, was employed by the United States Drug Enforcement Agency (hereinafter "DEA") from September 15, 1985 until July 15, 2005, when he was removed, based upon his mental disability. Mr. Thornton claimed that his removal was improper based upon the Rehabilitation Act of 1973 and a reprisal for his previous Equal Employment Opportunity (hereinafter "EEO") activity. At the time of his removal, Mr. Thornton was suffering from post traumatic stress disorder (hereinafter

"PTSD"), directly related to injuries that he sustained while performing his duties for the DEA. Mr. Thornton challenged his removal based on the DEA's failure to accommodate him.

In 1988, Mr. Thornton was involved in two (2) work related automobile accidents. Shortly after the last automobile accident, Mr. Thornton was involved in a running shootout, in which a gun battle ensued, and in which Mr. Thornton was pinned under a vehicle. These experiences were so traumatic for Mr. Thornton that he developed PTSD, which is a mental impairment that an individual develops after experiencing severe trauma. PTSD is a treatable condition through a variety of methods, which include controlled exposures to the event through therapy; intervention to reduce feelings of guilt, anger, shame or helplessness; and medication therapy.

In addition, Mr. Thornton has brought a claim for retaliation, referred to in the federal employment statutes as reprisal, based upon a prior discrimination claim. During this same period of time in which Mr. Thornton experienced the traumatic events, Mr. Thornton was also subjected to several acts of mistreatment by his supervisors. On March 7, 2003, Mr. Thornton filed a complaint of discrimination, which was based on a non-selection for Assistant Special Agent in Charge position. This complainant is not the current subject of litigation; however, it forms the basis of the current retaliation claim.

During the investigation of the prior complaint, it was discovered that one of Mr. Thornton's supervisors, Mr. John Andreiko, had made derogatory

remarks to the Career Board. Mr. Stephen Castill also told Mr. Thornton fictitious stories of his own involvement in shootouts. Mr. Castill also continually and purposefully showed Mr Thornton graphic pictures from the aftermath of the September 11, 2001, tragedy, in a further effort to exacerbate Mr. Thornton's condition. Mr. Andreiko's actions and other discriminatory treatment, caused Mr. Thornton's PTSD to again manifest and flare up. Mr. Thornton began experiencing sleepless nights, sweats, and other disabling symptoms.

From October 20, 2002, to July 15, 2005, Mr. Thornton was assigned to serve as Special Assistant to the Assistant Administrator, Office of Intelligence. This position did not require Mr. Thornton to carry a firearm, or conduct aggressive law enforcement duties, such as making arrests, or engaging in searches, seizures or interdiction efforts. The Special Assistant to the Assistant Administrator position was primarily a policy setting position.

On September 10, 2003, Mr. Thornton took leave due the severe exacerbation of his PTSD, which had increased to such an extent that it almost completely incapacitated him. Mr. Thornton remained in leave status, until July 15, 2005. Prior to taking leave, Mr. Thornton was under the supervision of Mr. Stephen Castill, and during the time that he was on leave, Mr. Thornton was under the supervision of Ms. Judith Bertini and Mr. Harold Wankel.

During the time that Mr. Thornton was on leave, September 10, 2003, through April 5, 2004, the DEA made no effort to assess Mr. Thornton's condition. The

DEA was, however, aware of Mr. Thornton's PTSD, as well as its cause and the reasons for the exacerbation. Dr. Johnny Lu, a contract physician hired by the DEA, assessed Mr. Thornton and determined that he should be evaluated under the DEA's Suitability Review Protocol (hereinafter "SRP"). The SRP states that an employee can be subjected to an exam 1) for deficient performance, attendance or behavior; 2) for perceived possible medical or psychiatric problem, 3) when all potential courses of action are fully discussed and documented, and 4) the employee has been counseled by a supervisor, who established a record of deficiency.

The DEA has two (2) procedures to determine an employee's fitness for duty. The DEA's personnel manual utilized the same procedures for an examination that are applicable to all federal employees, however, it was the DEA's policy that no employee will remain in a position if he or she was physically or mentally incapable of performing the duties of his or her position safely and efficiently. The policy further stated that any employee who has a permanent physical disability may be suitable for assignment to another position. The policy also stated that, in cases of physical disability, the DEA would make every reasonable effort to find a position for the physically disabled employee. ***Under the DEA procedures, employees with mental disabilities were not eligible for assignment to another position***.

The DEA has a written policy that discriminates against employees with mental disabilities; however, the DEA offers reasonable accommodations to employees who are physically disabled or handicapped. The DEA's personnel manual, section 2339.13, states

that the DEA will not grant a reasonable accommodation to an employee with a mental disability.

The DEA determined that Mr. Thornton had a mental disability that caused him to be unavailable for assignment to another position. Thus, due to his unavailability, Mr. Kevin Donnelly proposed Mr. Thornton's removal from federal service. The DEA, through Mr. Kevin Donnelly, stated the existence of a mental health condition alone, disqualifies an agent from his position under any and all circumstances. Mr. Donnelly also states that ***he did not make any efforts to find Mr. Thornton a reasonable accommodation***. Mr. Donnelly stated that he did not make any efforts to determine if there were any available positions, that which Mr. Thornton could safely and efficiently perform. Thus, Mr. Donnelly admitted to failing to engage in the interactive process.

Mr. Thornton was evaluated by two (2) mental health professionals for Forensic Review, pursuant to the SRP. At the time of the examination, Mr. Thornton did not have any performance deficiencies or conduct deficiencies. During the Forensic Review, it was determined that Mr. Thornton had PTSD and should be reevaluated in ninety (90) days, however, the DEA determined it was removing Mr. Thornton before the reevaluation. On February 7, 2005, the DEA proposed to remove Mr. Thornton due to medical unavailability requested via a letter from Mr. Kevin Donnelly. The DEA further advised Mr. Thornton that he could request an accommodation, but any request must include a plan for continued treatment for the condition. Mr. Thornton, who was not represented by counsel at the time, requested an accommodation and to be

considered for positions where he could perform duties of other DEA core series positions. The DEA ultimately removed Mr. Thornton and did not provide him reasonable accommodation.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAS IMPROPERLY INTERPRETED THE REHABILITATION ACT OF 1973 AS EXCLUDING INDIVIDUALS WITH MENTAL DISABILITIES, AND IN SO RULING IS IN DIRECT CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT.

The court of appeals'[1] decision upheld the DEA's accommodation policy, which openly discriminates against individuals with mental disabilities, by excluding them from being able to be provided with an accommodation. Essentially, the court of appeals ruled that the Rehabilitation Act of 1973 (hereinafter "Rehabilitation Act") does not afford protection to individuals with mental disabilities. This decision clearly contradicts the precedent of this Court.

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[1] The Court of Appeals for the Fourth Circuit adopted and affirmed the United States District Court for the Eastern District of Virginia's opinion as the basis of its decision.

A. THE COURT OF APPEALS' DECISION DETERMINED THAT THE DEA'S POLICY TO "NOT" ACCOMMODATE PERSONS WITH MENTAL DISABILITIES WAS VALID UNDER THE REHABILITATION ACT OF 1973.

Under the the Americans with Disabilities Act of 1990 (hereinafter "ADA"), a request as straightforward as asking for continued employment is a sufficient request for accommodation. 42 U.S.C. § 12111(9)(B). The standards used to determine whether an employer has discriminated under the Rehabilitation Act are the standards applied under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12111 et seq., and the provisions of sections 501 through 504, and 510 of the ADA, 42 U.S.C. §§ 12201-12204 and 12210. See 29 U.S.C. § 791(g). Therefore, the general rule is that no covered entity shall discriminate against a qualified individual with a disability because of the disability. See 42 U.S.C. § 12112(a). Discrimination under the Rehabilitation Act includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of the applicant." Id. §12112(b)(1). Discrimination also includes: not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. Id. § 12112(b)(5)(A).

To reasonably accommodate an employee's disability, once the employee has asked for continued employment, the employer is required to identify the full range of alternative positions available and to consider transferring the employee to any of these other alternatives, including those that would represent a demotion. See 42 U.S.C.A. § 12111(9)(B). An employer has a duty under the ADA to consider reassigning its disabled employees to other jobs for which they are qualified, once they ask for continued employment. See 42 U.S.C.A. § 12111(9)(B).

The "reasonable accommodation" element of the ADA imposes a duty upon employers to engage in a flexible, interactive process with the disabled employee needing accommodation so that, together, they might identify the employee's precise limitations and discuss accommodations which might enable the employee to continue working. See 29 C.F.R. § 1630.2(o)(3); see also 29 C.F.R. Pt. 1630, App. § 1630.9.

If the employee is unable to perform the duties of his job, with or without accommodation, the employer must consider reassignment as one form of accommodation. 42 U.S.C.§ 12111(9)(B)[2].

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[2] The Equal Employment Opportunity Commission (hereinafter "EEOC"), the entity specifically charged with implementing the ADA, explains an employer's duty of reassignment in its Enforcement Guidance:

Where an employee can no longer perform the essential functions of his/her original position, with or without reasonable accommodation, because of a disability-related occupational injury, an employer must reassign him/her to an equivalent position for which s/he is qualified, absent undue hardship. If no equivalent

The DEA's accommodation policy is in conflict to these rules of law, because the DEA states that it will not provide an employee, with a mental disability, an accommodation. Thus, the court of appeals' determination that the Agency did not fail to accommodate Mr. Thornton, validates this policy.

In order to establish a *prima facie* case for failure to accommodate, a plaintiff must demonstrate that (1) he or she is an individual who has a disability

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position (in terms of pay, status, etc.) exists, then the employee must be reassigned to a lower graded position for which s/he is qualified, absent undue hardship. EEOC Enforcement Guidance: "Workers' Compensation and the ADA," ADA Manual No. 57 at 70:1220 para. 22(BNA). The interpretation of the ADA by the enforcing agency is entitled to deference. See EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); Deane v. Pocono Med. Ctr., 142 F.3d 138, 143 n. 4 (3d Cir.1998); Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 150 n. 3 (2d Cir.1998); Olson v. Dubuque Community Sch. Dist., 137 F.3d 609, 612 (8th Cir.1998); cf. Kralman v. Illinois Dep't of Veterans' Affairs, 23 F.3d 150, 155 (7th Cir.1994) (EEOC interpretation of ADEA given deference), cert. denied, 513 U.S. 948, 115 S.Ct. 359, 130 L.Ed.2d 313 (1994); Hale v. Marsh, 808 F.2d 616, 620 (7th Cir.1986) (EEOC view of Title VII claim given weight). The EEOC's guidelines, " 'while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " Smith v. Midland Brake, Inc., 138 F.3d 1304, 1308 n. 2 (10th Cir.1998) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)).

within the meaning of the statute; (2) the employer had notice of the disability; (3) with reasonable accommodation he could perform the essential functions of the position; and (4) the employer refused to make such accommodations. Rhoads v. F.D.I.C., 257 F.3d 373, 387 (4th Cir. 2001).

Under the Americans with Disabilities Act (ADA) Amendments Act of 2008 (hereinafter "Amendments Act"), which takes effect January 1, 2009, the definition of disability has been expanded to "be construed in favor of broad coverage of individuals under [the] Act, to the maximum extent permitted by the terms of [the] Act." 42 U.S.C. 12101, Publ. L. No. 110-325, (2008). The Amendments Act specifically amends sections of the Rehabilitation Act to be consistent with the provisions of the Amendments Act. Additionally, the Amendments Act also states that "the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." Id. Thus, the expansive definition of disability will eliminate much of the litigation over the individual disability status and will now focus on what constitutes a "reasonable accommodation." Moreover, the Amendments Act now provides a cause of action for those individuals who are regarded as having an impairment if they can establish they have been "subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Id.

The "reasonable accommodation" question asks whether the accommodation: (1) would be "effective," i.e., would it address the job-related difficulties presented by the employee's disability; and (2) would allow the employee to attain an "equal" level of achievement, opportunity and participation, that a non-disabled individual in the same position would be able to achieve. Bryant v. Better Bus. Bureau of Greater Md., 923 F.Supp. 720, 736 (D.Md., 1996).

The DEA advised Mr. Thornton that in replying to the proposed removal, he could request an accommodation, and any request must include a plan for continued treatment for the condition. Mr. Thornton, responded to Mr. Donnelly, by requesting a reasonable accommodation to continue his current treatment and to be considered for positions where he could perform duties of other DEA core series positions. Thus, Mr. Thornton's accommodation request was clearly within the bounds of the ADA.

In response to this request, the DEA not only failed to offer Mr. Thornton any accommodation, but it also refused to even consider reassigning or transferring Mr. Thornton to another position. Without being offered an alternative position, Mr. Thornton was not afforded the opportunity, which the ADA provides individuals with disabilities, to decide, in concert with his treating physicians, if he was capable of working in the alternate position.

In a more egregious act, the DEA had already determined that Mr. Thornton was to be terminated, before it even received all the medical information related to Mr. Thornton's ability to perform duties of

his position. The DEA acknowledges that it did not review Dr. Cohen's, Mr. Thornton's treating physician, medical records, until after Mr. Thornton filed his complaint. These actions lead to the conclusion that the DEA did not consider Mr. Thornton's requests for accommodation, since it does not provide accommodations to individuals a mental disabilities, and would rather terminate the employee.

The United States Court of Appeals for the Seventh Circuit in Hendricks-Robinson, et al. v. Excel Corporation, 154 F.3d 685 (7th Cir.1998) summarized that the central issue in that case was violative under the ADA, and reversed the District Court's grant of summary judgment to Excel. Id. whether Excel's medical layoff policy violated the ADA because it failed to provide reasonable accommodation to its permanently restricted employees. Id. at 688. The Circuit Court concluded that there was sufficient evidence to create genuine issues of material fact concerning Excel's medical layoff policy and its duty to make reasonable accommodations for disabled individuals as at 700.

The DEA's policy specifically failed to accommodate individuals with mental disabilities, since it stated employees with mental disabilities were not eligible for assignment to another position. The same policy, however, provided that employees, who have permanent physical disabilities, are candidates for assignment to other positions. This policy overtly discriminates against individuals with mental disabilities, which clearly flies in the face of the Rehabilitation Act, since the policy limits, segregates, and/or classifies employees, those with mental

disabilities, adversely, on account of the nature of their disabilities. 42 U.S.C. § 12112(b)(1).

The DEA's policy has completely foreclosed the possibility of accommodating and/or reassigning an employee with a mental disability, and the DEA, affected this policy against Mr. Thornton, since he was not afforded an opportunity to be reassigned. More importantly, he was not even afforded the opportunity to engage in the interactive process. Mr. Donnelly testified that the existence of a mental heath condition alone, disqualifies an agent from his position under all circumstances. The court of appeals rejected the Seventh's Circuit ruling in Hendricks-Robinson, which has created a substantial conflict. Thus, in the Seventh Circuit individuals with mental disabilities and individuals with physical disabilities are treated equally, while the Fourth Circuit has held that it is permissible to treat individuals with mental disabilities differently than individuals with physical disabilities.

B. THE COURT OF APPEALS HAS IMPROPERLY HELD THAT TO BE CONSIDERED A QUALIFIED INDIVIDUAL WITH A DISABILITY, ONLY AN INDIVIDUAL WITH A MENTAL DISABILITY MUST BE READY WILLING AND ABLE TO PERFORM THE DUTIES OF HIS OR HER CURRENT POSITION.

The court of appeals concluded that Mr. Thornton was not a qualified individual with a disability under the ADA, at the time he was terminated. A "qualified individual with a disability" is identified as

"an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Fourth Circuit has explained that if a job function bears more than a marginal relationship to the job at issue, it is an essential job function. Rohan v. Networks Presentations LLC, 375 F.3d 266, 279 (4th Cir. 2004). "[E]ssential functions means the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). In determining which job functions are essential, the court may consider the employer's judgment and the amount of time an employee must spend performing the function. 29 C.F.R. § 1630.2(n)(3)(I), (iii). If the DEA had offered Mr. Thornton a reasonable accommodation, then he could have performed the essential functions of the job that he desired.

The threshold requirement for coverage is that an individual is disabled under the Act. 29 U.S.C. § 794(a); Gupton v. Virginia, 14 F.3d 203, 205 (4th Cir.1994). The Act defines an "individual with a disability" as any person who: (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B). In order to establish that he is "substantially limit[ed]" in one or more of the "major life activities," [Mr. Thornton] must show that he has "an impairment that prevents or severely restricts [him] from doing activities that are of central importance to most people's daily lives." Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d

615 (2002). The impairment must be "permanent or long term." Id. The record is clear that Mr. Thornton suffered from a mental impairment, which substantially limited one or more of his major life activities.

Mr. Thornton, could perform the essential functions of the employment position that he held or *desired, with an accommodation.* 42 U.S.C. § 12111(8). The court of appeals based its decision on the determination that Mr. Thornton was not a qualified individual because he allegedly could not meet the attendance requirements, however, Mr. Thornton was actually requesting an accommodation to be transferred from his position. The court of appeals reasoned that Mr. Thornton was not ready willing and able for work, since he was on leave. The court of appeals only considered Mr. Thornton's current position, when making the determination as to whether or not he was available for work. Moreover, the court of appeals wholly failed to consider, whether Mr. Thornton was able to perform the duties of any other position. Thus, the conclusion, as stated by the court of appeals, is that the employee must be able to perform the duties of only his or her position, which is an improper statement of the law.

II. THE COURT OF APPEALS HAS IMPROPERLY HELD THAT A PLAINTIFF CAN NOT PROVE A CLAIM OF REPRISAL WHERE A BIASED SUBORDINATE, WHO LACKS DECISIONMAKING POWER, USES THE FORMAL DECISIONMAKER AS A DUPE IN A DELIBERATE SCHEME TO TRIGGER A DISCRIMINATORY EMPLOYMENT ACTION.

To establish a *prima facie* claim of retaliation, an employee must demonstrate that: (1) he engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection existed between the protected activity and the adverse action. Hooven-Lewis v. Caldera, 249 F.3d 259 (4th Cir. 2001). There is no dispute that Mr. Thornton engaged in previous EEO activity. There is no dispute that the DEA took an adverse employment action against Mr. Thornton when his employment was terminated. The matter which is in dispute is whether a causal connection existed between Mr. Thornton's previous EEO activity and the removal, the adverse action.

The court of appeals reasoned that only the alleged discriminatory animus of "the one principally responsible for the decision or the actual decision maker for the employer" is relevant in determining whether an adverse employment action was actionable. See Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 291 (4th Cir. 2004). However, Mr. Thornton had a viable claim under the rubber stamp or "cat's paw"

theory.[3] The "cat's paw" theory refers to a situation, in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir.1998). The "rubber stamp" doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 288 (4th Cir. 2004) (en banc). Several circuits have overwhelmingly endorsed some version of these doctrines. See Galdamez v. Potter, 415 F.3d 1015, 1026 n. 9 (9th Cir. 2005); Hill, 354 F.3d at 290; Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999); Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1311-12 (D.C.Cir.1998); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 354-55 (6th Cir.1998); Long v. Eastfield Coll., 88 F.3d 300, 307 (5th Cir.1996); Abrams v. Lightolier Inc., 50 F.3d 1204, 1213-14 (3d Cir.1995); Stacks v. S.W. Bell Yellow Pages, Inc., 27 F.3d 1316, 1323 (8th Cir.1994); Shager v. Upjohn Co., 913 F.2d 398,

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[3]"The "cat's paw" doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. See Fables of La Fontaine 344 (Walter Thornbury trans., Chartwell Books 1984). As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. Id. Today the term "cat's-paw" refers to "one used by another to accomplish his purposes." Webster's Third New International Dictionary Unabridged 354 (2002)." E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 484 (10th Cir., 2006).

405 (7th Cir.1990) (Posner, J.) (inaugurating the descriptor "cat's-paw" for this category of claim).

This Court noted that, "holding employers accountable for the actions of biased subordinates also advances the purposes of [the Rehabilitation Act]. It should go without saying that a company's organizational chart does not always accurately reflect its decisionmaking process." See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151-52, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (finding that the bias of a supervisor, the husband of the formal decisionmaker, could be imputed to the company because the supervisor "was the actual decisionmaker" and was "principally responsible for petitioner's firing"); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir., 2000) (noting that "courts will not blindly accept the titular decisionmaker as the true decisionmaker"). Thus, it is clear that this case is the classic, non-selection case, under a rubber stamp theory.

The court of appeals failed to accord the weight that should be given to the evidence, namely the individuals in decision making positions, who harbored a discriminatory animus and the ability to affect Mr. Thronton's removal. Mr. Guevara, who was named as a Responsible Management Official in Mr. Thornton's previous EEO complaint, and who was also the intimately involved in the process that ultimately led up to Mr. Thornton's termination. Mr. Guevara was responsible for ordering Mr. Thornton's mandatory psychiatric examination, and he was one of the deciding officials concerning the Agency's SRP process. While Mr. Guevara did not sign the letter terminating Mr. Thornton's employment, he was inextricably linked and

involved in the decision to terminate Mr. Thornton's employment and was clearly using the other DEA management officials as dupes to accomplish his discriminatory actions. Thus, at minimum, the court of appeals' ruling that these responsible management officials are irrelevant, clearly runs contrary to the law of the circuits. Moreover, this ruling has further split the circuits as to whether discrimination can occur in a rubber stamp context.

CONCLUSION

This petition should be granted because the court of appeals and the district court have misconstrued the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964, to afford less rights to individuals with mental disabilities and to narrowly define a responsible management official in a reprisal claim. Moreover, at a bare minimum, the ruling has created a divide among the circuits that this Court can resolve. Wherefore, Petitioner Respectfully asks this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1988

JOHNNY D. THORNTON,
Plaintiff - Appellant,
v.
MICHAEL B. MUKASEY, Attorney General,
Defendant - Appellee.

No. 07-2097

JOHNNY D. THORNTON,
Plaintiff - Appellant,
v.
MICHAEL B. MUKASEY, Attorney General,
Defendant - Appellee.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:06-cv-00397-GBL). Gerald Bruce Lee, District Judge.

July 2, 2008, Submitted
July 21, 2008, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: Christopher D. Vaughn, MELVILLE JOHNSON, P.C., Atlanta, Georgia, for Appellant.

Chuck Rosenberg, United States Attorney, Dennis C. Barghaan, Jr., Assistant United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES: Before MOTZ and DUNCAN, Circuit Judges, and WILKINS, Senior Circuit Judge.

PER CURIAM:

In these consolidated appeals, * Johnny D. Thornton appeals the district court's order granting summary judgment to his former employer in his action alleging violations of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (2000). This court reviews a district court's order granting summary judgment de novo, viewing the facts and drawing reasonable inferences in the light most favorable to the non-moving party. *Doe v. Kidd*, 501 F.3d 348, 353 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 1483, 170 L. Ed. 2d 297 (2008). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue [*2] as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). With these standards in mind, we have thoroughly reviewed the briefs and the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court *Thornton v. Mukasey*, No. 1:06-cv-00397-GBL (E.D. Va. filed Aug. 27, 2007; entered Aug. 29, 2007). We dispense with oral argument because the facts and legal contentions are adequately presented in

the materials before the court and argument would not aid the decisional process.

AFFIRMED

Footnotes

*The multiple appeals result from the fact that Thornton and his counsel each filed a separate notice of appeal from the final order of the district court.

Filed 8/27/2007
1:06-cv-00397-GBL
United States District Court
for the Eastern District of Virginia,
at Alexandria.

JOHNNY D. THORNTON,
Plaintiff,
v.
MICHAEL B. MUKASEY, Attorney General,
Defendant.

Gerald Bruce Lee, District Judge.

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Alberto Gonzalez's Motion for Summary Judgment on Plaintiff's Discrimination, Accommodation and Retaliation Claims. This case concerns Plaintiff Johnny D. Thornton's allegations that his former employer, the Drug Enforcement Agency ("DEA"), discriminated against him by wrongfully terminating him as a result of his disability, or in the alternative that the DEA failed to offer him an accommodation to continue his employment. The three issues before this Court are: 1) whether the Court should grant Defendant's Motion for Summary Judgment on Plaintiff's discriminatory termination claim where Plaintiff cannot demonstrate under the American with Disabilities Act framework that he could perform the "essential functions of the position" at the time of his dismissal; 2) whether the Court should grant Defendant's Motion for Summary Judgment on Plaintiff's, accommodation claim where Plaintiff cannot demonstrate under the Americans with

Disabilities Act that framework that he could perform the "essential functions of the position" with an accommodation at the time of his dismissal from the DEA; and 3) the Court should grant Defendant's Motion for Summary Judgment on Plaintiff's retaliation claim where Plaintiff cannot offer any evidence that the employee responsible for his termination either had any involvement with Plaintiff's previous EEO activity or had any relationship with the individuals at used of acting in a discriminating fashion toward Plaintiff. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's wrongful termination claim because Plaintiff could not perform the essential functions of the position at the time of his dismissal. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's failure to accommodate claim because Plaintiff could not have performed the essential duties of the job with any reasonable accommodation by the DEA. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's retaliation claim because Plaintiff cannot establish a causal connection between his prior EEO activity and his termination.

I. BACKGROUND

Plaintiff began his employment with the DEA as an agent in 1985. Early on in his tenure with the DEA, Plaintiff engaged in a series of life-threatening law enforcement-related altercations, including one in which a suspect shot at him while he attempted to serve an arrest warrant. As a result of these encounters, Plaintiff began experienced symptoms of Post Traumatic Stress Disorder ("PTSD"). In 2003, Plaintiff was assigned to a position in DEA headquarters as Assistant to the Chief of Intelligence.

Plaintiff's duties included significant travel and reviewing presentations that included graphic pictures of DEA-related enforcement activities along with the events of September 11, 2001. Plaintiff reported at the time that he did not wish to hear about any shootings or violence because it reminded him of his own traumatic experiences.

Plaintiff subsequently went on sick leave in September 2003 to obtain treatment for his PTSD. In February 2004, Plaintiff's psychiatrist informed the DEA that she recommended Plaintiff be placed on indefinite leave. Plaintiff subsequently exhausted his sick leave and sought 240 hours and advance sick leave and was granted 120 hours from the DEA. Plaintiff was also ordered to submit a detailed medical report from his treating physician. Plaintiff's physician responded by stating that he was being treated for PTSD, severe depression and anxiety, that he was experiencing a decreasing concentration and energy, and that he was currently unable to return to work and would not be able to for at least three months.

When plaintiff exhausted his advanced sick leave, we requested an additional 336 hours of sick leave without pay, 240 of which was initially approved and the remaining ninety-six hours were eventually approved by a senior administrator. DEA officials also submitted Plaintiff's request for extended leave India valuation from his treating psychologist to the DEA's chief medical officer, who found that Plaintiff's use of leave was appropriate and that he should be evaluated under the DEA's Suitability Review Protocol ("SRP").fn1 After a total of 10 months of leave, Chief Inspector Rogelio Guevara referred the plaintiff to a Forensic

Team for evaluation.

Plaintiff subsequently met with two mental health professionals for his Forensic Review in September 2004. Both reviewers found that Plaintiff was currently unfit for duty with the DEA, that his ability to function and focus had been compromised, and that his continued service and law enforcement was unadvised. The doctors also found that the plaintiff could not "perform the full range of duties without endangering the health and safety of himself and others," that he may never be able to return to law enforcement work and that it would definitely be no sooner than three additional months. The doctor who performed the peer review concurred in that assessment in November 2004 and order to Plaintiff and his treating physician to develop a plan to return to work or for disability retirement.

Neither Plaintiff nor his treating physician ever responded to this request. They did, however, file for disability benefits, asserting that Plaintiff would never be able to return to work or improve sufficiently to perform his duties due to the stressful environment of the DEA.

The Forensic Team subsequently forwarded the SRP reports to Inspector Guevara, who decided that based on the evaluation, Plaintiff could not perform the duties of his position and should be relieved of duty as a special agent. Plaintiff received a letter informing him of the Inspector's decision to remove him from service and the basis for the decision. The letter also offered Plaintiff the opportunity to respond to the deciding official with a request for an accommodation which

would necessitate that Plaintiff provide a plan for treatment and sign a release granting DEA medical official access to his files. The DEA subsequently assigned Plaintiff's proposed removal to Deciding Official Kevin Donnelly.

Plaintiff had initially sought and was granted an extension of time from Donnelly to consult with a physician to determine a proper accommodation. Plaintiff also retained an attorney to respond to the proposed removal. In his May 2005 response, Plaintiff objected to the Forensic Team's evaluation of his condition and the ultimate recommendation. Plaintiff received additional extensions of time to consult with physician but never submitted a report from his treating physician. Plaintiff met with Mr. Donnelly in June of 2005 to provide an oral response to the proposed removal, at which time Plaintiff stated that he could not then return to service in the DEA and did not know when he would be able to return.

On June 24, 2005, Donnelly terminated the plaintiff from DEA service, basing his decision on the findings of the Forensic Team combined with Plaintiff's failure to create and submit a plan through his treating physician to return to DEA service and the likelihood that the DEA could not reasonably accommodate Plaintiff. Plaintiff appealed his termination to the Merit Systems Protection Board which affirmed the plaintiff's termination.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate where no material issues of fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56c. In evaluating a summary judgment motion, the Court must view the facts in the light most favorable to the nonmoving party. Middlebrooks v. University of Maryland, 1999 WL 7860, *4 (4th Cir. 1999)(citing Evans v. Technologies Applications & Services Co., 80 F. 3d 954, 958 (4th Cir. 1996). "Once the nonmoving party discharges its burden by showing that there is an absence of evidence to support the nonmoving party's case, the nonmoving party then must come forward with specific facts showing that there is a genuine issue for trial. Middlebrooks, 1999 WL at *4 (citing Celotex Corp. v. Catrett, 477 U. S. 317, 325 (1986)) (internal quotations omitted). "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby Inc., 477 U. S. 242, 256 (1986). "Summary judgment will be granted unless a fair-minded jury could return a verdict for the [non-moving party] on evidence presented." Middlebrooks, 1999 WL at *4 (citing liberty Lobby Inc., 477 U. S. at 247-48.

B. Analysis

1. Qualified Individual With Disability

The Court grants Defendant's Motion for Summary Judgment on Plaintiff's claim for wrongful termination because he was not a qualified individual as defined by the ADA when he was terminated. "Under the ADA, only persons who are "qualified' for the job in question

may state a claim for discrimination." Tyndall v. National Educ. Centers, Inc. of California, 31 F. 3d 209, 213 (4th Cir. 1994). "The Supreme Court has interpreted this provision to mean that a 'qualified' person must be "able to meet all of a program's requirements in spite of his handicap.'" Id. (quoting Southeastern Community College v. Davis, 442 U. S. 397, 406 (1979)). "The ADA defines 'qualified individual with a disability' as: an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." Id. "except in the unusual case where an employee can effectively perform all work-related duties at home, employee 'who does not come to work cannot perform any of his job functions, essential or otherwise.'" Id. " (citing Wimbley v. Boiger, 642 F. Supp 481, 485 (W.D. Tenn. 1986) ("An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA.").

Defendant contends that as a result of Plaintiff's PTSD, he could no longer function in any capacity as a field or desk agent of the DEA because in either venue, Plaintiff would be exposed to potentially disturbing images or experiences that would aggravate his PTSD. Plaintiff countered by suggesting that the DEA had other possible positions where he could serve without having to "carry a gun or drive an emergency vehicle." Plaintiff also suggest that as a senior agent, he need not be exposed to the types of stimulus that aggravated his PTSD in order to fulfill his duties. Similarly, Plaintiff asserted that as the scope of his position as Assistant to the Chief of Intelligence did not align with the standard duties of agent of his level, that the DEA could not hold

him to that standard duties of an agent of his level in establishing whether he could perform at the level necessary to maintain employment. While employers are generally the best judges of what the essential functions of the job are, see EEOC v. Amego, Inc., 110 F. 3d 135, 147 (1st Cir. 1997), the Court need not address Plaintiff's assertions because he fails to meet the standard of a qualified employee on other grounds.

Plaintiff went on sick leave in September of 2003 for the express purpose of seeking intensive treatment for his PTSD. Plaintiff made several subsequent requests for additional time to seek treatment when his physician determined that he would not yet be fit for duty. When plaintiff met with the deciding official in early 2005, by his own admission he was not yet prepared to return to work in any capacity and was unsure of when he would be able to return. Moreover, three reviewing physicians, including Plaintiff's own treating physician found Plaintiff unfit for duty with limited prospects of every reaching any level of fitness to return to work. As Plaintiff could not even meet the attendance requirement of his job after 18 months of treatment, it was appropriate for the DEA to find that he was no longer fit for duty. Tyndall, 31 F. 3d at 213.

Plaintiff argues that the government's determination that he was incapable of performing the duties of a special agent was improper because the position immediately prior to taking sick leave did not require the normal law enforcement function, and that other similar positions within the DEA may also have been suited to his condition. The Court notes, however, that it was Plaintiff's desk position and the exposure to disturbing images of law enforcement related activities

that initially aggravated his PTSD and led to his subsequent 18 month period of leave for intensive treatment. Plaintiff was not fit for duty with or without an accommodation under the ADA, and accordingly, the Court grants Defendant's Motion for Summary Judgment on Plaintiff's discriminatory termination claim.fn2

2. Reasonable Accommodation

The Court grants Plaintiff's Motion for Summary Judgment on Plaintiff's reasonable accommodation claim because Plaintiff could not provide a tangible timeframe in which he could return to work with or without an accommodation. "Even though a disabled employee is unable to perform the essential functions of an employment position his termination may nevertheless be unlawful if the employer has failed to reasonably accommodate the employee's disability." Myers v. Hose, 59 F. 3d 276, 282 (4th Cir. 1995). "(R)easonable accommodation does not require the [employer] to wait indefinitely for [Plaintiff's] medical conditions to be corrected, especially in light of the uncertainty of cure." Id. "[A]n employee cannot base a reasonable accommodation claims solely on the allegation that the employer failed to engage in an interactive process." Walter v. United Airlines, Inc., No. 99-2622, 2000 WL 158-7489, at * 4 (4th Cir. Oct. 24, 2000).

Plaintiff argues that he should have been entitled to additional review from the DEA in order to fashion appropriate accommodation, and that the DEA failed to appropriately interact with him in order to fashion said accommodation. Plaintiff's argument is without merit.

The DEA provided a substantial accommodation when it permitted Plaintiff to take almost a year and a half of leave to seek intensive treatment for his PTSD. Plaintiff argues that the DEA did not do enough to work with him to fashion an accommodation but when the DEA corresponded with Plaintiff and his treating physicians about possibilities for accommodation, neither were responsive. The Seventh Circuit held, "[w]here the missing information as of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding information may be found to have obstructed the process." Beck v. Univ. of Wisconsin Bd of Regents, 75 F. 3d 1130, 1136 (7th Cir. 1996). It is not reasonable for Plaintiff to require the DEA to have waited in definitely for him to become fit for duty, having already permitted the Plaintiff to take 18 months of leave, where the Plaintiff and his treating physician failed to offer potential accommodation solutions. Accordingly, Defendant's Motion for Summary Judgment on Plaintiff's reasonable accommodation claim is granted.

3. Retaliation

The Court grants Plaintiff's Motion for Summary Judgment on Plaintiff's retaliation claim because Plaintiff can neither establish a causal connection between his firing and his protected activities, nor can he rebut the DEA's non-discriminatory reasons for firing him. "[T]o establish a prima facie Sec. 2000e-3 retaliation case, a plaintiff must show that: (1) she engages in a protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection existed between the protected

activity and the asserted adverse action." Von Gutten v. Maryland, 243 F. 3d 858, 860 (4th Cir. 2000). A lengthy time lapse between the employer becoming aware of the claimant's protected activity and the alleged adverse employment action negate[s] any inference that a causal connection exist[s]." McNeil v. Scotland County, 213 F. Supp. 2d 559, 568 (M.D.N.C. 2002) (citing Hooven-Lewis v. Caldera, 249 F. 3d 259, 278 (4th Cir. 2001)). In the Forth Circuit, only the alleged discriminatory animus of "the one principally responsible for the decision or the actual decision-maker for the employer," is relevant in determining whether an adverse employment action was actionable. Hill v. Lockheed Martin Logistics Mgmt., 354 F. 3d 277, 291 (4th Cir. 2004).

Plaintiff argues that the significant length of time between his prior EEO activity and his subsequent termination should not suggest a lack of retaliation. Plaintiff also suggest that Inspector Guevera was both involved in his SRP review process and one of a group of employees who were the subject of his EEO complaint and consequently his retaliation claim should survive summary judgment. Plaintiff's argument is without merit. The sole final decision-maker in Plaintiff's termination was Mr. Donnelly, who relied on information provided by Plaintiff's treating physician, DEA reviewing physicians, and Plaintiff's supervisors. Plaintiff has offered no evidence that Mr. Donnelly, or the four physicians who made a judgment that he was unfit for duty, harbored any animus against him in deciding that he could not continue with the DEA. See Hill, 354 F. 3d at 291. Absent that type of evidence, Plaintiff cannot overcome the inference of lack of retaliation raised by the gap in time between his prior

EEO activity and his subsequent relief from duty. Accordingly, Defendant's Motion for Summary Judgment on Plaintiff's retaliation claims is granted.

III. CONCLUSION

For the foregoing reasons, the Court grants Defendant's Motion for Summary Judgment. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's wrongful termination claim because Plaintiff could not perform the essential functions of the position at the time of his dismissal. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's failure to accommodate claim because Plaintiff could not provide a tangible time frame in which he could return to work with or without an accommodation. The Court grants Defendant's Motion for Summary Judgment on Plaintiff's retaliation claim because Plaintiff cannot establish a causal connection between his prior EEO activity and his termination.

For the foregoing reasons, it is hereby

ORDERED that Defendant Alberto Gonzalez's Motion for Summary Judgment on Plaintiff's Discrimination, Accommodation and Retaliation Claims is GRANTED.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 27 day of August, 2007.

Footnotes

Fn1 The DEA SRP is a program in place to evaluate

the mental fitness of DEA employees who demonstrate mental problems and whose jobs, like the plaintiff's, require some degree of mental fortitude. The SRP may refer employees with mental instability issues for review by the DEA Chief Inspector, who in turn, if appropriate, may refer an employee to two mental health professionals who personally examine the subject and one additional mental health professional who acts in a peer review capacity over the two direct treatment professionals. This review group is called a "Forensic Team."

Fn2 The same analysis would also be appropriate to establish Defendant's non-discriminatory reason for firing the plaintiff, which would also serve to negate Plaintiff's wrongful termination and retaliation claims as Plaintiff has not reasonably rebutted that reason as pretext for disability-based discrimination. See Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 143 (2000) ("[T]he plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'").

Filed 8/27/2007
1:06-cv-00397-GBL
United States District Court
for the Eastern District of Virginia,
at Alexandria.

JOHNNY D. THORNTON,
Plaintiff,
v.
MICHAEL B. MUKASEY, Attorney General,
Defendant.

Gerald Bruce Lee, District Judge.

FINAL JUDGMENT ORDER

THIS MATTERis before that Court on Defendant Alberto Gonzalez's Motion for Summary Judgment on all of Plaintiff Johnny D. Thornton's claims. In its previous Memorandum Opinion of August 27, 2007, the Court granted Defendant's Motion for Summary Judgment. From the foregoing, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of defendant Alberto Gonzalez, Attorney General of the United States and against Plaintiff Johnny D. Thornton.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to Counsel.

Filed 9/23/2008
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1988(l)

JOHNNY D. THORNTON,
Plaintiff - Appellant,
v.
MICHAEL B. MUKASEY, Attorney General,
Defendant - Appellee.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Duncan, and Senior Judge Wilkins.

29 USC § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings
It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.